

HUMANITARIAN RELIEF IN CONJUNCTION WITH HOUTHİ FTO RE-DESIGNATION

Following recent Houthi attacks against civilian populations, there have been widespread calls for the United States to re-designate the Houthis as a foreign terrorist organization (“FTO”). At the same time, questions have arisen as to how to mitigate the effects of an FTO designation on humanitarian efforts in Yemen. This paper outlines ways to address these questions.

Background

On January 10, 2021, the State Department designated the Houthis as an FTO, citing in particular the “targeting the civilian airport in Aden on December 30, in which the Houthis struck the arrival terminal killing 27 individuals, including three staff members of the International Committee of the Red Cross...”¹ On February 12, 2021, the State Department reversed course and revoked the FTO designation, but did so solely based on “a recognition of the dire humanitarian situation in Yemen.”² The State Department explained that “the United States remains clear-eyed about [the Houthis’] malign actions, and aggression, including taking control of large areas of Yemen by force, attacking U.S. partners in the Gulf, kidnapping and torturing citizens of the United States and many of our allies, diverting humanitarian aid, brutally repressing Yemenis in areas they control, and the deadly attack on December 30, 2020 in Aden against the cabinet of the legitimate government of Yemen.”³

The legal ramifications of an FTO designation are as follows:

1. It is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide “material support or resources” to a designated FTO.
2. Non-U.S. representatives and members of a designated FTO may not enter the United States and, in certain circumstances, may be ordered to leave the United States.
3. Any financial institution that has control of funds in which a designated FTO has an interest must retain those funds and report them to the Treasury Department.

Criminal Liability for Knowingly Providing “Material Support or Resources” to an FTO

The proposed re-designation of the Houthis as an FTO raises questions about how to immunize legitimate non-governmental organizations (“NGOs”) and humanitarian relief workers from even inadvertently running afoul of U.S. laws that prohibit providing aid to FTOs. In particular, it is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide (or attempt or conspire to provide) “material support or resources” to a designated FTO, a term broadly defined to include “any property, tangible or intangible, or service, including currency . . . financial services, lodging, training, expert advice or assistance, safehouses . . . personnel . . . except medicine or religious materials.”⁴

¹ U.S. Department of State, *Terrorist Designation of Ansarallah in Yemen*, (Jan. 10, 2021), <https://2017-2021.state.gov/terrorist-designation-of-ansarallah-in-yemen/index.html>.

² U.S. Department of State, *Revocation of the Terrorist Designations on Ansarallah*, (Feb. 12, 2021), <https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah/>.

³ *Id.*

⁴ See 18 U.S.C. § 2339B.

The U.S. Supreme Court has made clear that a violation of the “material support” provision occurs only if it done “knowingly” and if the “support” is given “to” the FTO; an inadvertent form of assistance or indirect benefit is not enough. According to the Supreme Court:

Congress clarified the mental state necessary to violate [the law], requiring *knowledge* of the foreign group’s designation as a terrorist organization or the group’s commission of terrorist acts. Congress also added the term “service” to the definition of “material support or resources,” ... and defined “training” to mean “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”. It also defined “expert advice or assistance” to mean “advice or assistance derived from scientific, technical or other specialized knowledge.” Finally, [Congress] clarified the scope of the term “personnel” by providing: “No person may be prosecuted ... in connection with the term ‘personnel’ unless that person has *knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals* (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. *Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.*⁵

Thus, according to the Supreme Court, working separately but in parallel with an FTO to advance its aims – let alone to dispense humanitarian aid to a general population – does not constitute “material support” for an FTO.

Broad Ways to Authorize Humanitarian Relief

Despite the Supreme Court explaining that a violation of the “material support” provision requires actual knowledge and direct assistance “to” an FTO, it is understandable that NGOs and humanitarian workers want confidence that they will not face criminal prosecution for providing relief to the people of Yemen.

Fortunately, there are a number of ways that the U.S. Government can assure NGOs and aid workers that they will not be prosecuted. In particular, the Justice, State, and Treasury Departments – which are principally responsible for the enforcement of U.S. terror-related laws – can publish regulations, licenses, guidelines, and other materials explaining how they will 1) interpret and enforce relevant legal provisions relating to “material support” for the Houthis as an FTO or 2) provide broad, express relief for U.S. and non-U.S. persons engaged in a wide range of humanitarian-related transactions:

⁵ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7 (2010) (citations omitted; referring to the Intelligence Reform and Terrorism Prevention Act of 2004, §6603, 118 Stat. 3762–3764) (emphasis added).

- ***DOJ Regulations Stating No Prosecutions for Humanitarian Relief.*** The Department of Justice (“DOJ”) can promulgate binding regulations⁶ or issue a guidance memorandum to federal prosecutors making clear that no person shall be prosecuted for merely providing food, beverages/hydration, medicine, medical treatment, or other prescribed relief in Yemen without exception.⁷ DOJ also could issue a memorandum to its prosecutors stating that even the provision to members of the Houthis of a defined set of items or services necessary to the preservation of human life does not constitute an enforcement priority.
- ***Good Faith Exception.*** Relatedly, DOJ could promulgate regulations or issue guidance to federal prosecutors stating that no parties will be prosecuted if they in good faith believe that they are providing humanitarian aid in Yemen – regardless of whether such aid directly or indirectly involves or benefits the Houthis – so long as they are not directly involved in violent terrorist activities by the Houthis. The U.S. government previously issued a type of “good faith” prosecution exemption in August 2011 to U.S. groups providing aid to famine victims in Somalia despite the potential involvement or presence of Al-Shabaab, an FTO.⁸
- ***General Licenses.*** DOJ regulations or guidance also can make clear that good faith can be presumed if a party acts within the scope of a general license issued by the Treasury Department. In January 2021, when the U.S. Government designated the Houthis as an FTO, the Treasury Department issued numerous general licenses to authorize U.S. persons to engage in a wide range of activities without exposure to civil sanctions risks (*i.e.*, U.S. Government official business, international organizations, NGOs, and the exportation of agricultural commodities, medicine, and medical devices). The Treasury Department can reissue and expand these licenses.
- ***Frequently Asked Questions (“FAQs”).*** In addition, DOJ regulations or guidance can state that good faith can be presumed where a party acts in accordance with FAQs issued by the Treasury Department, which has frequently relied on FAQs in connection with past sanctions designations as an informal way to describe the scope of proscribed activities. In several cases, Treasury has issued FAQs stating that (1) non-U.S. persons may engage in or facilitate transactions involving FTOs if such activity would be authorized under a general license if engaged in by a U.S. person or (2) if U.S. persons unknowingly make humanitarian-related payments to FTOs, such activity would not be a focus for Treasury sanctions enforcement.⁹

⁶ With respect to its authority to promulgate a regulation in this context, the Justice Department may rely on 18 U.S.C. § 2339B(e)(1), which states that “[t]he Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or *regulation* issued pursuant to this section” (emphasis added).

⁷ In doing so, the Attorney General could consider invoking 18 U.S.C. § 2339B(j), which provides an exception to the “material support” provision as follows: “[n]o person may be prosecuted under this section in connection with the term ‘personnel,’ ‘training,’ or ‘expert advice or assistance’ if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General” (as long as the support or resources are not given to an FTO to carry out terrorist activity).

⁸ U.S. Dep’t of State, Background Briefing on Somalia and Delivery of Humanitarian Assistance, (Aug. 2, 2011), <https://2009-2017.state.gov/p/af/rls/spbr/2011/169479.htm>.

⁹ See, e.g., U.S. Department of Treasury, *Issuance of Counter Terrorism General Licenses and related FAQs; Counter Terrorism Designations; Venezuela-related Designations; CAATSA - Russia-Related Designations; Yemen-Related Designations Updates* (Jan. 19, 2021), <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20210119>.

- ***Fact Sheets.*** Finally, DOJ can make clear that good faith can be presumed where the conduct in question is in accordance with Treasury Department “Fact Sheets” and other similar guidance describing permissible humanitarian assistance.